

ENTERED

October 31, 2017

David J. Bradley, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

JERRY BUTLER SMITH JR.,

Plaintiff,

VS.

TDCJ PAROLE BOARD, *et al*,

Defendants.

§
§
§
§
§
§
§

CIVIL ACTION NO. 2:16-CV-478

**MEMORANDUM AND RECOMMENDATION TO DENY APPLICATION
FOR LEAVE TO APPEAL *IN FORMA PAUPERIS***

Pending is Plaintiff's application for leave to proceed *in forma pauperis* on appeal (D.E. 30). Plaintiff filed a premature notice of appeal of the Magistrate Judge's Memorandum and Recommendation. The District Court has not yet ruled on Plaintiff's objections or on the Magistrate Judge's recommendation. The appeal is premature and the Court of Appeals has no jurisdiction to hear an appeal of the magistrate judge's Memorandum and Recommendation. *United States v. Cooper*, 135 F.3d 960, 962-63 (5th Cir. 1998). Moreover, a ruling on the Memorandum and Recommendation would not result in entry of final judgment because it has been recommended that a failure to protect claim be retained and service of process has already been ordered (D.E. 26, 27); therefore any such ruling would not be appealable. 28 U.S.C. §§ 1291-92. *See also Tower v. Moss*, 625 F.2d 1161, 1164-65 (5th Cir. 1980) ("partial disposition of a multi-claim or multi-party action is ordinarily not a final appealable order").

It is respectfully recommended that the District Court certify that the appeal was not taken in good faith and deny Plaintiff's application for leave to proceed *in forma pauperis* (D.E. 30). FED. R. APP. P. 24(a)(4)(B).

Plaintiff may move to voluntarily dismiss his appeal within fourteen (14) days of the date of this Memorandum and Recommendation and request to withdraw his application for leave to appeal *in forma pauperis*. If Plaintiff chooses to go forward with his appeal, it is recommended that the following order be entered:

The Court has considered the appellant's application for leave to proceed *in forma pauperis* on appeal and his trust account information (D.E. 30). Petitioner has not filed his six-month trust fund statement because he is no longer in TDCJ custody, but he is confined at, and subject to, rules of parole at a halfway house. *See Jackson v. Johnson*, 475 F.3d 261, 265-66 (5th Cir. 2007) (parolee confined at halfway house is a prisoner for purposes of the three strikes rule). The court **ORDERS** that:

1. The appellant is assessed an initial partial filing fee of **\$50.00**; The agency having custody of appellant shall collect this amount from the inmate's trust account when funds are available and forward it to the court. If the agency does not control Plaintiff's earnings, Plaintiff is ordered to pay an initial partial filing fee of **\$50.00** within thirty (30) days of entry of the District Judge's ruling on his application for leave to appeal *in forma pauperis*.

2. Thereafter, the appellant shall pay **\$455.00**, the balance of the filing fee, in periodic monthly installments as required by 28 U.S.C. § 1915(b)(2). The agency shall forward 20% of each deposit made to the plaintiff's account whenever the balance in the

2 / 4

account exceeds \$10. This amount shall be collected from the appellant's trust account, when funds are available, and forwarded to the Clerk of the District Court. If the agency having custody of Plaintiff does not control Plaintiff's earnings, then Plaintiff shall forward to the Court **\$50.00** each thirty days following payment of the initial partial filing fee until full payment of the filing fee has been received. These payments may be made to the Clerk in the Houston or Corpus Christi Divisions of the Southern District of Texas. Absent good cause, failure by the Plaintiff to timely make a payment will result in the dismissal of Plaintiff's appeal for want of prosecution. FED. R. CIV. P. 41(b).

3. The plaintiff shall sign all consents and other documents required by the agency having custody of plaintiff to authorize the necessary withdrawal from the plaintiff's inmate trust account, if applicable.

4. The application for leave to proceed *in forma pauperis* on appeal pursuant to 28 U.S.C. § 1915 (D.E. 30) is **GRANTED**.

5. The Clerk shall send a copy of this Order to the Chief Accounting Officer, Cheyenne Center, Inc., PO Box 11627, Houston, Texas 77293.

Respectfully submitted this 31st day of October, 2017.


B. JANICE ELLINGTON
UNITED STATES MAGISTRATE JUDGE

NOTICE TO PARTIES

The Clerk will file this Memorandum and Recommendation and transmit a copy to each party or counsel. Within **FOURTEEN (14) DAYS** after being served with a copy of the Memorandum and Recommendation, a party may file with the Clerk and serve on the United States Magistrate Judge and all parties, written objections, pursuant to Fed. R. Civ. P. 72(b), 28 U.S.C. § 636(b)(1), General Order No. 2002-13, United States District Court for the Southern District of Texas.

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within FOURTEEN (14) DAYS after being served with a copy shall bar that party, except upon grounds of *plain error*, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. Douglass v. United Servs. Auto Ass'n, 79 F.3d 1415 (5th Cir. 1996) (en banc).